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TH Heavy Engineering Bhd v Daba Holdings (M) Sdn Bhd (formerly known as Dugwoo (M) Sdn Bhd)

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HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24NCC(ARB)-31–10 OF 2016
KHADIJAH IDRIS JC
29 SEPTEMBER 2017

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Arbitration — Agreement — Validity of arbitration agreement — Whether there existed valid and binding arbitration agreement — Injunction — Interim injunction — Whether interim injunction ought to be granted

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The plaintiff had entered a contract with the defendant for the supply of flanges and fittings to the Layang FPSO Conversion Project ('supply contract'). The plaintiff had issued several purchase orders pursuant to the supply contract which were accepted by the defendant and the goods were supplied in two batches. The plaintiff however defaulted in payment and the defendant issued two letters of demand which there was no response from the plaintiff. A second set of notices were issued by the defendant demanding the outstanding sums. The defendant later proceeded to issue a notice under s 218 of the Companies Act 1965 demanding payment for the above sums or risk a winding up proceeding. The plaintiff however filed the current originating summons seeking, amongst others, a declaration that the arbitration clause in the FPSO Layang purchase order terms and condition was operating and binding between the plaintiff and the defendant and an interim injunction. The issues for determination of the court were: (a) whether there existed a valid and binding arbitration agreement between the plaintiff and the defendant within the context of s 9 of the Arbitration Act 2005 ('the Act'); and (b) whether an interim injunction to restrain the defendant from presenting a winding up petition ought to be granted and the matters herein be referred to arbitration for determination.

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Held, dismissing prayers 1, 2, 3, 4 and 5 of the originating summons:

(1) There was no evidence to show that the parties had intended to submit to arbitration. There was no valid and binding arbitration agreement between the plaintiff and defendant for disputes arising between them to be referred to arbitration. The issue argued by the defendant that the arbitration agreement was inoperative did not arise as there was no valid and binding arbitration agreements between the parties in the first place (see para 48).

I

(2) In view of the finding that there was no valid and binding arbitration agreement, it followed that the plaintiff's application for an interim injunction failed as there was no basis to compel the defendant to refer the dispute to arbitration. Injunction being an ancillary or incidental relief could not stand on its own as it was dependent upon there being upon a pre-existing cause of action arising out of a legal or equitable right and granted to preserve the status quo pending the ascertainment of disputes. The issue of restraining the defendant from pursuing a winding up proceeding against the plaintiff did not arise. There was also no issue of preserving status quo (see para 51).

[Bahasa Malaysia summary

Plaintif telah memasuki kontrak dengan defendan untuk membekalkan bebibir dan kelengkapan kepada Projek Penukaran FPSO Layang ('kontrak pembekalan'). Plaintif telah mengeluarkan beberapa pesanan pembelian berikutan kepada kontrak pembekalan yang mana diterima oleh defendan dan barangan dibekalkan dalam dua kumpulan. Plaintif walau bagaimanapun mengingkari bayaran dan defendan mengeluarkan dua surat tuntutan yang mana tidak ada jawapan daripada plaintif. Set notis kedua dikeluarkan oleh defendan menuntut jumlah yang belum dibayar. Defendan kemudiannya meneruskan untuk mengeluarkan notis di bawah s 218 Akta Syarikat 1965 menuntut bayaran bagi jumlah di atas atau risiko prosiding penggulungan. Plaintif walau bagaimanapun memfailkan saman pemula ini memohon, antara lain, perisytiharan bahawa klausa timbang tara di dalam terma dan syarat pesanan pembelian FPSO Layang beroperasi dan mengikat di antara plaintif dan defendan dan injunksi interim. Isu-isu untuk penentuan mahkamah adalah: (a) sama ada wujud perjanjian timbang tara yang mengikat dan sah di antara plaintif dan defendan dalam konteks s 9 Akta Timbang Tara 2005 ('Akta'); dan (b) sama ada injunksi interim untuk menghalang defendan daripada mengemukakan petisyen penggulungan patut diberikan dan perkara di sini dirujuk kepada timbang tara bagi penentuan.

Diputuskan, menolak permohonan 1, 2, 3, 4 dan 5 saman pemula:

(1) Tidak terdapat keterangan untuk menunjukkan bahawa pihak-pihak berniat untuk berserah kepada timbang tara. Tidak terdapat perjanjian timbang tara yang mengikat dan sah di antara plaintif dan defendan bagi pertikaian yang berbangkit di antara mereka untuk dirujuk kepada timbang tara. Isu yang dihujahkan oleh defendan bahawa perjanjian timbang tara tidak beroperasi tidak berbangkit memandangkan tidak terdapat perjanjian timbang tara yang mengikat dan sah di antara pihak-pihak pada mulanya (lihat perenggan 48).

(2) Mengambil kira dapatan bahawa tidak terdapat perjanjian timbang tara yang mengikat dan sah, oleh itu permohonan plaintif untuk injunksi interim gagal memandangkan tidak terdapat asas untuk memaksa

defendan untuk merujuk pertikaian kepada timbang tara. Injunksi sebagai relif sampingan tidak dapat berdiri dengan sendiri kerana ia bergantung ke atas kausa tindakan yang pra wujud berbangkit daripada hak ekuiti atau undang-undang dan diberikan untuk mengekalkan status quo sementara menunggu pemastian pertikaian. Isu menghalang defendan daripada memfailkan prosiding penggulungan terhadap plaintif tidak berbangkit. Juga tidak terdapat isu mengekalkan *status quo* (lihat perenggan 51).]

Notes

For a case on validity of arbitration agreement, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1765.

Cases referred to

Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd [2013] 5 MLJ 625; [2013] 7 CLJ 18, FC; (refd)

Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd [2010] 3 MLJ 656, CA (refd)

IMPSA (M) Sdn Bhd v Bank Muamalat Malaysia Berhad & Ors [2011] MLJU 1535; [2011] 1 LNS 729, HC (refd)

Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors [1995] 1 MLJ 193, CA (refd)

Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors [1982] 2 MLJ 162, FC (refd)

Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd [2016] 5 MLJ 417; [2016] 9 CLJ 1, FC (refd)

Legislation referred to

Arbitration Act 2005 ss 9, 9(5), 10, 10(1)(a), 11
Companies Act 1965 s 218
Sale of Goods Act 1957 ss 4(1), 5

John Kan (Izral Partnership) for the plaintiff.
Shaik Mohamed Imran bin Mohd Ismet Bashah (Farah A Zabir & Partners) for the defendant.

Khadijah Idris JC:

INTRODUCTION

[1] This Originating Summons WA-24NCC(ARB)-31–10 of 2016 ('OS') was filed by the plaintiff seeking, inter alia, for a declaration that the arbitration clause in FPSO Layang purchase order terms and condition is operating and binding between the plaintiff and defendant and that the defendant be restrained from presenting any petition to wind up the plaintiff.

[2] On 13 February 2017 after hearing submissions from both parties I dismissed the OS with costs. Aggrieved with the said decision the plaintiff appealed.

FACTUAL BACKGROUND

[3] The plaintiff, TH Heavy Engineering Bhd is a company incorporated under the Companies Act 1965 in Malaysia and had its business address at Level 26, Menara Bank Islam, No 22, Jalan Perak, Kuala Lumpur. It is a public listed company in Bursa Malaysia. The plaintiff is actively involved in the oil and gas industry since 2002. The main activities of the plaintiff are centered around the heavy engineering industry principally in the fabrication of offshore steel structures and the provision of other related offshore oil and gas engineering services in Malaysia.

[4] The defendant, DABA Holdings (M) Sdn Bhd, is a company registered in Malaysia and had its registered address at Lot 11268, Tingkat 1, Jalan Besar, Taman Perindustrian Paka, Kg Cacar, Paka, Terengganu. The defendant was formerly known as Dugwood (M) Sdn Bhd.

[5] The plaintiff had entered into a contract with the defendant for the supply of flanges and fittings to the Layang FPSO Conversion Project ('supply contract').

[6] Pursuant to the supply contract, the plaintiff issued several purchase orders for the supply of flanges and fittings to the defendant. The purchase orders were as follows:

(a) purchase order H100000300-1 dated 3 September 2015;

(b) purchase order H100000301-1 dated 3 September 2015;

(c) purchase order H100000318-1 dated 22 October 2015;

(d) purchase order H100000319-1 dated 22 October 2015;

(e) purchase order H100000322-1 dated 4 November 2015;

(f) purchase order H100000327-1 dated 27 October 2015;

(g) purchase order H100000354-1 dated 13 January 2016;

(h) purchase order H100000355-1 dated 14 January 2016; and

(i) purchase order H100000356-1 dated 14 January 2016

[7] The defendant accepted the above purchase orders and supplied the goods in two batches and issued invoices for those goods supplied. This fact is not disputed.

[8] The invoices issued in respect of the two batches of the purchase orders were:

(a) first batch:

(i) invoice No IV/THHEB/15/003 dated 12 November 2015 amounting to USD224,322.10 (H100000300-1);

(ii) invoice No IV/DUG15/THHEB/004 dated 23 November 2015 amounting to USD346,920.21 (H100000301-1);

(iii) invoice No IV/DUG15/THHEB/005 dated 17 December 2015 amounting to USD59,034.09 (H100000318-1);

(iv) invoice No IV/DUG15/THHEB/006 dated 17 December 2015 amounting to USD130,909.44 (H100000322-1);

(v) invoice No IV/DUG15/THHEB/007 dated 17 December 2015 amounting to USD63,172.79 (H100000319-1); and

(vi) invoice No IV/DUG15/THHEB/008 dated 31 December 2015 amounting to USD77,073.46 (H100000327-1);

(b) second batch:

(i) invoice No IV/DUG16/THHEB/004 dated 29 February 2016 amounting to USD84,386.18 (H100000356-1);

(ii) invoice No IV/DUG16/THHEB/002 dated 29 February 2016 amounting to USD179,479.51 (H100000355-1); and

(iii) invoice No IV/DUG16/THHEB/003 dated 29 February 2016 amounting to USD158,469.89 (H100000354-1).

[9] The plaintiff defaulted in payment and the defendant issued two letters of demand through its solicitor Messrs Razila Rohaya & Co dated 18 July 2016 for sums of USD901,432.09 and USD422,335.28 (for the first and second batch of supply respectively). The plaintiff did not respond to the notices. Subsequently the defendant issued a second set of notices dated 22 August 2016 which were sent through the same solicitor demanding the outstanding sums. Both sets of demand letters were exhibited in the defendant's affidavit in opposition affirmed on 4 November 2016 (exhs 'DH2' and 'DH3').

[10] The defendant then proceeded to issue a notice under s 218 of the Companies Act 1965 ('the CA 1965') dated 7 September 2016 demanding payment for the above sums or risk a winding up proceeding (exh 'DH4').

[11] On 14 October 2016 the plaintiff filed this OS seeking for the following reliefs:

(a) a declaration that the arbitration clause in the FPSO Layang purchase order terms and condition is operating and binding between the plaintiff and the defendant;

(b) consequently, a declaration that the issuance of notices dated 7 September 2016 pursuant to s 218 of the Companies Act 1965 by the defendant on disputed claims amount to an abuse of process;

(c) that the defendant, be restrained, whether by itself, or by its servants or agents or otherwise howsoever, from presenting any petition to wind up the plaintiff under the CA 1965 pursuant to the said notices dated 7 September 2016 or otherwise, without referring the matters to arbitration for determination;

(d) in the event that the defendant presents a winding up petition against the plaintiff pending the hearing and disposal of this application be heard and/or argued, the defendant whether by itself, or by its servants or agents or otherwise howsoever restrained from advertising or *gazetting* or publishing the said petition or the proceedings herein which should be stayed until the matters in the said notices are fully determined by reference to arbitration;

(e) such further and/or other orders and/or directions as the court deems just in the circumstances including but not limited to an interlocutory order in terms of para (c) above pending the hearing and disposal of this OS; and

(f) costs of this application be provided for.

THE PLAINTIFF'S CONTENTIONS

[12] It is the plaintiff's case that the purchase orders issued are subject to the FPSO Layang purchase order general terms and conditions ('FPSO terms and conditions') (exh 'P2' of the plaintiff's affidavit encl 3) as all the purchase orders incorporates the FPSO terms and conditions. The FPSO terms and conditions contain a provision which requires parties to settle any dispute or any matter arising out of the contract by arbitration.

[13] The plaintiff submits the FPSO terms and conditions is incorporated into the purchase orders by virtue of s 9(5) of the Arbitration Act 2005 ('the AA 2005'). Under s 9(5) of the AA 2005 there is no requirement for the defendant to sign the FPSO terms and conditions as contended by the defendant. It is the plaintiff's position that the defendant agreed to the FPSO terms and conditions when it accepted the purchase orders. As such the plaintiff submits there is a valid and binding arbitration agreement between the parties.

[14] In view of the fact there exist a valid and binding arbitration agreement between the parties and that the plaintiff disputed the alleged claim by the defendant, the dispute ought to be referred to arbitration for determination. The issuance of the statutory notices under s 218 of the CA 1965 threatening to wind up the plaintiff is therefore an abuse of process of the court.

[15] The plaintiff therefore sought for an interim injunction under s 11 of the AA 2005 to restrain the defendant from presenting a winding up petition. The plaintiff identified these issues as the basis for seeking an interim injunction:

(a) there are serious issues to be tried which includes:

(i) whether there is any breach on the part of the plaintiff;

(ii) whether the plaintiff is entitled to withhold payment pursuant to cl 3.7 of the FPSO terms and conditions; and

(iii) whether the defendant is entitled to charge an interest of KLIBOR plus 1%pa on the full amount of the invoice for every month or part of month that invoice payment is delayed;

(b) damages are insufficient to compensate the plaintiff; and

(c) should the court dismiss the OS, the plaintiff will suffer irreparable damage since the plaintiff is a well known public listed company as well as an associate company of Lembaga Tabung Haji. However if the OS is allowed the defendant will only suffer monetary losses as the defendant is only claiming unpaid invoices from the plaintiff (which the plaintiff makes no admission and is in any event denied by the plaintiff).

THE DEFENDANT'S CONTENTIONS

[16] The contractual relationship between the parties are premised on the purchase orders, delivery orders and invoices issued thereto. The invoices (exh 'DH1' of the defendant's affidavit encl 5) expressly states the following:

(a) all payments for the invoices must be made to an account belonging to Dugwoo (M) Sdn Bhd which is the defendant's previous name with Bank Islam, Dungun branch. This is clearly stated in all the invoices issued to the plaintiff;

(b) all payments are to be made within 30 days from the date of the invoices;

(c) any late payments will be subjected to a penalty of 8% per month; and

(d) any dispute in relation to the invoice are to be raised within seven days from the date of the invoice.

[17] According to the defendant this is a straight forward case of goods sold and delivered. The defendant had delivered the goods ordered as evident from the delivery orders issued by the defendant and the goods delivered are in accordance with the purchase orders issued by the plaintiff. The plaintiff has failed, refuse or neglected to dispute each of the invoices sent to them within the stipulated time or at any time thereafter. The plaintiff has failed to make any payment in respect of the goods delivered.

[18] The defendant alleges the issues raised by the plaintiff in the OS are baseless. The disputes raised are afterthought as it was only raised after the defendant initiate legal action against the plaintiff by issuing statutory notices under s 218 of the CA 1965.

[19] With regards to reference to arbitration, it is the defendant's position that there is no arbitration agreement between the parties for the following reasons:

(a) the defendant has never agreed to the FPSO terms and conditions (exh 'P3' to the plaintiff's affidavit encl 3); and

(b) the FPSO terms and conditions were not signed by the plaintiff and the defendant.

[20] In its written submission learned counsel for the defendant refers to s 10(1)(a) of the AA 2005 and contends since there is no arbitration agreement between the parties therefore no reference to arbitration can be made because the arbitration agreement is inoperative.

[21] The defendant submits that it is the terms stipulated in the purchase orders, delivery orders and invoices which binds the parties. Accordingly the plaintiff's application to restrain the defendant from presenting a winding up petition is an abuse of the process of the court. Furthermore the defendant is entitled to enforce its rights under the law as a result of the plaintiff's failure to pay for the goods supplied and delivered by the defendant to the plaintiff.

ISSUES

[22] Based on the facts narrated above, the issues which requires determination of this court may be stated as follows:

(a) whether there exist a valid and binding arbitration agreement between the parties within the context of s 9 of the AA 2005; and

(b) whether an interim injunction to restrain the defendant from presenting a winding up petition ought to be granted and the matters herein be referred to arbitration for determination.

A THE LAW

[23] In so far as the AA 2005 is concerned the definition and form of arbitration agreement is stipulated in its s 9 which reads as follows:

B 9 Definition and form of arbitration agreement

(1) In this Act, 'arbitration agreement' means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

C (2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing where it is contained in —

D (a) a document signed by the parties;

(b) an exchange of letters, telex, facsimile or other means of communication which provide a record of the agreement; or

(c) an exchange of statement of claim and defence in which the E existence of an agreement is alleged by one party and not denied by the other.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part F of the agreement.

[24] The plaintiff's application for an injunctive relief is made under s 11 of the AA 2005 which reads:

G *11 Arbitration agreement and interim measures by High Court*

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for:

H (a) security for costs;

(b) discovery of documents and interrogatories;

(c) giving of evidence by affidavit;

(d) appointment of a receiver;

I (e) securing the amount in dispute, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

(f) the preservation, interim custody or sale of any property which is the subject matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party; and

(h) an interim injunction or any other interim measure.

(2) Where a party applies to the High Court for any interim measure and an arbitral tribunal has already ruled on any matter which is relevant to the application, the High Court shall treat any findings of fact made in the course of such ruling by the arbitral tribunal as conclusive for the purposes of the application.

(3) This section shall also apply in respect of an international arbitration, where the seat of arbitration is not in Malaysia.

[25] The Federal Court in *Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625; [2013] 7 CLJ 18 explained how s 9 of the AA 2005 works:

> [25] We are of the view that an arbitration agreement need not be signed. Section 9(3) and 9(4) of the Act provide that the arbitration agreement must be in writing and the writing requirement is satisfied if the arbitration agreement is in a document signed by the parties or is in an exchange of letters, telex, facsimile or other means of communication which provide for a record of the agreement. As such a written agreement to arbitrate does not necessarily mean a formal agreement executed by both parties. It would be sufficient so long as the arbitration agreement is incorporated into a written document.
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> [26] ... Section 9(5) of the Act in our view addresses the situation where the parties, instead of including an arbitration clause in their agreement, include a reference to a document containing an arbitration agreement or clause. It also confirms that an arbitration agreement may be formed in that manner provided, firstly, that the agreement in which the reference is found meets the writing requirement and secondly, that the reference is such as to make that clause part of the agreement. The document referred to need not to be signed by the parties to the contract (see the case of *Astel-Peiniger Joint Venture (a joint venture partnership) v Argos Engineering and Heavy Industries Co Ltd* [1994] 3 HKC 328). We are of the view that the mere fact the arbitration clause is not referred to in the contract and that there is a mere reference to standard conditions which was neither accepted nor signed, is not sufficient to exclude the existence of the valid arbitration clause. There is no requirement that the arbitration agreement contained in the document must be explicitly referred to in the reference. The reference need only be to the document and no explicit reference to the arbitration clause contained therein is required.

THE COURT'S FINDINGS

[26] The plaintiff placed heavy reliance on two captions which appears in the purchase orders issued by the plaintiff to support its position that purchase orders incorporates the FPSO terms and conditions. The plaintiff submits the two captions refers to the FPSO terms and conditions which contain an

A arbitration agreement clause which is cl (m) which reads as follows:

> Any dispute between the PARTIES as to the performance of this CONTRACT or the rights or liabilities of the PARTIES herein, or any matter arising out of the same or connected therewith, which cannot be settled amicably shall be settled by arbitration in accordance with the Rules of Regional Centre for Arbitration Kuala
B Lumpur ('RCAKL'). Such arbitration shall be held at Kuala Lumpur, Malaysia. The award of the arbitrators shall be final and binding upon the PARTIES ...

[27] It is noted that although there is a supply contract between the plaintiff
C and the defendant, it is both parties mutual/common position that the relationship between them in respect of the supply of the flanges and fittings is premised on the purchase orders issued by the plaintiff and the delivery orders and invoices in respect thereto issued by the defendant. Essentially the three documents read together tantamount to a contract of sale of goods which
D comes within the ambit of the Sale of Goods Act 1957 ('the SGA 1957'). Sections 4(1) and 5 of the SGA 1957 provides, among others, as follows:

> 4(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price ...
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> 5(1) A contract of sale is made by an offer to buy or sell goods for a price and the
E acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.
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> (2) Subject to any law for the time being in force, a contract of sale may be made
F writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

[28] In the context of s 9 of the AA 2005 the purchase orders, delivery orders and invoices are the agreement which is supposed to contain the arbitration
G agreement either in the form of an arbitration clause or in the form of a separate agreement. If it is in the form of a separate agreement s 9(5) of the AA 2005 dictates, among others, that the separate agreement which contains the arbitration clause shall be referred to in the agreement so as to make the said clause as part of the agreement between the parties. Hence what is intended to
H be incorporated under s 9 of the AA 2005 is the arbitration clause in the separate agreement and certainly not the terms of the separate agreement itself. The plaintiff's contention that the purchase orders incorporates the FPSO terms and conditions is therefore misconstrued.

I **[29]** Furthermore the plaintiff cannot unilaterally incorporate a new set of terms and conditions ('the FPSO terms and conditions') to what was mutually agreed earlier between the plaintiff and the defendant as evident in the purchase orders, delivery orders and the invoices. In fact the defendant

vehemently denied agreeing to the FPSO terms and conditions and pointed out that the said terms as in exh 'P2' to the plaintiff's affidavit encl 3 was not signed by either parties.

[30] In so far as incorporation by reference is concerned reliance is placed on the purchase orders (exh 'P1' to the plaintiff's affidavit encl 3) as the agreement which incorporate the arbitration clause. Perusal of the purchase orders reveals the following salient information:

(a) that the purchase orders were issued by the plaintiff as purchaser;

(b) that the purchase orders were addressed to the defendant as the vendor;

(c) that the purchase orders were numbered and dated;

(d) the payment terms and currency were stipulated; and

(e) the goods were to be delivered either at Level 26 Menara Bank Islam No 22 Jalan Perak 50450 Kuala Lumpur or No 2 Jalan Sungai Chandong 13, Pulau Indah Industrial Park, 42920 Pulau Indah Selangor.

[31] Whereas information in relation to the goods are detailed out as follows:

(a) description;

(b) quantity;

(c) unit;

(d) delivery date;

(e) unit price;

(f) discount; and

(g) amount.

[32] On the last page of the purchase orders, the grand total and total amount were stated. The last page also bore the acknowledgement receipt of the defendant. There were two captions which appears just above and below the acknowledgement receipt. This caption is of significance in the instant case as the plaintiff contends it is the caption which incorporates the FPSO terms and conditions.

The first caption above the acknowledgement receipt reads:

> THIS IS A COMPUTER GENERATED DOCUMENT AND NO SIGNATURE IS REQUIRED. YOU ARE REQUIRED TO ACKNOWLEDGE THIS PURCHASE ORDER BY SIGNING AND RETURNING THE COPY

A TO US WITHIN 2 WORKING DAYS AND IN SO DOING, YOU CONFIRM THAT YOU ARE IN AGREEMENT WITH ALL THE TERMS AND CONDITIONS THEREIN.

The second caption which appear below the acknowledgment receipt reads:

B Note: Acceptance of this order constitute an acceptance of the general terms and conditions attached thereof

[33] Subsection 9(5) of the AA 2005 provides for two ways in which parties to a contract may manifest their agreement to arbitrate ('arbitration C agreement'). One way is by inserting in the contract executed by the parties an arbitration clause which expressly states the parties mutual agreement to resolve dispute arising out of the contract by way of arbitration. Another way of doing it is by making reference, in the contract executed by the parties, to a separate document containing an arbitration agreement clause. In the later D form, it is a pre-requisite that the agreement must be in writing and reference to the other document must be in such a manner as to make the arbitration clause contained in the other document as part of the agreement (*Ajwa for Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 5 MLJ 625; [2013] 7 CLJ 18). For the purpose of the AA 2005, an arbitration agreement is E considered to be in writing if such agreement is contained in a document which is signed by the parties or contained in an exchange of any communications between the parties or in an exchange of statement of claim or defence.

[34] The plaintiff cited two cases to support its contentions on the F incorporation by reference issue. The court in the two cases held there was an arbitration agreement between the parties and as such the dispute arose between them ought to be referred to arbitration. Whilst the legal principles established in the cases cited are very much relevant to the issue of G incorporation by reference, the determination of whether there is an arbitration agreement or otherwise would depend entirely on the facts of each particular case. The facts in the two cases cited by the plaintiff can be distinguished from the instant case. Most importantly, whether there is incorporation by reference within the context of s 9(5) of the AA 2205 or H otherwise is a matter of construction. The two cases are discussed below.

[35] *Press Metal Sarawak Sdn Bhd v Etiqa Takaful Bhd* [2016] 5 MLJ 417; [2016] 9 CLJ 1:

I (a) the plaintiff and the defendant entered into a contract of insurance where the defendant agreed to insure all critical plants and machineries of the plaintiff and loss of profits caused by sudden and unforeseen damages. The insurance contract was evidenced by a placement slip and an insurance policy certificate. The plaintiff suffered substantial losses and damage due to a wide power outage in the state of Sarawak. Dispute

arose between the parties as to the quantum of indemnity to be paid to the plaintiff under the insurance policy. The defendant disclaimed substantially its liability in respect of the plaintiff's claim for loss of profits by relying on various exclusions as contained in the machinery breakdown and loss of profits policy and issued a notice of arbitration. The plaintiff commenced court action claiming, among others, for an indemnity in respect of all losses and damage suffered and for various declaratory orders. The defendant filed for a stay of the court proceeding and to refer to arbitration. The defendant relied on two arbitration clauses of the policy certificate:

(i) the plaintiff argued the placement slip did not contain an arbitration clause. There was also no provision in the placement slip which allowed for the incorporation of an arbitration clause in the policy in question and therefore there was no arbitration agreement or clause in existence between the parties at the material time;

(ii) the defendant contended that the insurance policy in question was the same as the previous insurance policy issued by Jerneh Insurance Bhd to the plaintiff ('Jerneh Policy'). Subsequently the defendant had replaced Jerneh Insurance Bhd as the plaintiff's insurer. The defendant relied on the terms of the previous Jerneh Policy to support its contention that on the strength of the placement slip, there existed an arbitration clause between them as the insured and the insurer; and

(iii) the Federal Court agreed with the finding of fact made by the High Court in relation to the incorporation of the arbitration clause in the policy certificate. The Federal Court stated:

> [47] Based on the evidence adduced during the trial the learned judge made a finding that 'even though the placement slip do not expressly contain an arbitration clause, it is not a disputed fact that the placement slip makes reference to the following: Renewal of Policy No HW-E0023997-EMB-R002'. The learned judge concluded that the evidence adduced by the defendant clearly showed that the above reference related to the policy number of the previous Jerneh Policy and there was an understanding between the parties that the new policy would be based upon the terms of the expired Jerneh Policy.
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> [49] Together with other supporting documentary evidence in the form of an email from the defendant dated 24 October 2012 which also made reference to the placement slip and the renewal of the Jerneh Policy, and a series of emails between the plaintiff and its authorised broker, BIB Insurance, particularly an email dated 2 October 2012 from BIB Insurance, sent to the defendant, which clearly made reference to the renewal of the previous Jerneh Policy, the learned judge concluded that the expired Jerneh Policy contained an arbitration clause in relation to both the machinery breakdown and the loss of

A profits sections of the cover, and the said arbitration clause was effectively incorporated in the latter policies by the reference made in the placement slip.

B **[36]** Based on the facts in *Press Metal Sarawak* it is apparent that there was evidence adduced that the insurance policy issued by the defendant was to be based on the Jerneh Policy which contain an arbitration clause but which has since expired. The evidence concerned was the placement slip issued by the defendant which had made specific reference to the expired Jerneh Policy and that the plaintiff through its agent has agreed that the policy issued by the C defendant was to be based on the expired Jerneh Policy.

[37] Besides the said placement slip there were evidence in the form of exchange of emails between the defendant and the plaintiff's authorised broker D which made reference to the renewal of the previous Jerneh Policy. Premised on the said clear evidence the High Court ruled that the arbitration clause which was in the Jerneh Policy was effectively incorporated in the latter policies by the reference made in the placement slip.

E **[38]** *Albilt Resources Sdn Bhd v Casaria Construction Sdn Bhd* [2010] 3 MLJ 656:

(a) the defendant was appointed by Redez Properties Sdn Bhd ('the employer') as its main contractor for certain construction works. The F defendant had in turn via letter of award dated 4 June 2004 ('the June contract') appointed the plaintiff as its subcontractor. Pursuant to the June contract, the plaintiff claimed for a sum of RM334,273.37 from the defendant. Upon receiving the plaintiff's writ and statement of claim, and before filing the defence, the defendant applied for a stay, G pending arbitration. The defendant's counsel pointed out that in cl 1 of the June contract and cl 9 of the contract between the defendant and the employer, the word 'executed' meant 'signed'.

Clause 1 provides:

H > This contract is executed based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called 'The Main Contractor') and Redez Properties Sdn Bhd (hereinafter called 'The Employer') and all correspondence including the Letter of Award between the Main Contractor and The Employer.

I Clause 9 provides:

> The contract executed will be based on the terms and conditions as stipulated in the contract document between Albilt Resources Sdn Bhd (hereinafter called 'the Main Contractor') and Redez Properties Sdn Bhd (hereinafter called 'The Employer'). The contract shall be based on the Agreement and

Conditions of Building Contract (Without Quantities) published by Pertubuhan Akitek Malaysia ('PAM Contract'), together with amendments, additions or modifications as mentioned above.

(b) therefore the defendant claimed that under s 9 of the AA 2005, the true construction of cll 1 and 9 would lead to the conclusion that the June contract was subject to an arbitration agreement. On the other hand, the plaintiff's counsel took the position that the word 'executed' in cll 1 and 9 meant 'implemented, performed or carried out' and not 'signed'. He therefore disputed the existence of an arbitration agreement;

(c) the Court of Appeal held that that the terms of the PAM contract had been incorporated as part and parcel of the June contract. Low Hop Bing JCA said:

> [16] In the instant appeal, the June contract was awarded by the defendant to the plaintiff. It was signed by the defendant's director, and supported by all the terms and conditions stipulated therein, which had been acknowledged and accepted by the plaintiff's director and manager; both of them have also signed the 'Acknowledgment and Acceptance' form. In our view, there is no doubt that the June contract has been 'executed' ie, signed, sealed and delivered or brought into existence by the parties concerned.
>
> [17] The plaintiff and the defendant, having 'executed' the June contract, had in effect adopted and incorporated all the other relevant documents specifically stipulated therein, including the PAM Contract. In other words, by the June contract, they had expressly agreed to be bound by a series of documents viz:
>
> (1) Under cl 1, the letter of award dated 4 June 2004 which is based on:
>
> (a) the terms and conditions as stipulated in the contract document between the main contractor, Albilt Resources Sdn Bhd (ie, the defendant) and Redez Properties (ie, the employer); and
>
> (b) all correspondence including the Letter of Award between the defendant and the employer.
>
> (2) Under cl 9, the terms and conditions as stipulated in the contract document between the defendant and the employer; and that in turn shall be based on the PAM Contract, together with amendments, additions or modifications.
>
> [20] When all the aforesaid documents are construed conjunctively, it is abundantly clear that the terms of the PAM Contract have been incorporated as part and parcel of the June contract.

[39] Based on the facts in *Albilt Resources Sdn Bhd* it is very clear cl 1 of the June contract specifically states that the June contract was executed based on the terms and conditions stipulated in the contract between the defendant and the employer/Redez Properties Sdn Bhd and all correspondence between the

defendant and the employer/Redez Properties Sdn Bhd. Clause 9 of the contract between the defendant and the employer/Redez Properties Sdn Bhd states the contract between defendant and the employer are to be based on the agreement and conditions of building contract (without quantities) published by Pertubuhan Akitek Malaysia ('PAM contract').

[40] Thus in *Albilt Resources Sdn Bhd* the evidence before the court was this. That there was a reference made in the June contract (executed between the plaintiff and the defendant) to the contract between the defendant and its employer/Redez Properties Sdn Bhd and this contract between the defendant and its employer/ Redez Properties Sdn Bhd was specifically intended to be based on the PAM Contract which has an arbitration clause.

[41] I will now deal with the instant case. One pertinent point to note at the outset is that the captions in the purchase orders make no mention or reference to the FPSO terms and conditions.

(a) the first caption reads as follows:

> THIS IS A COMPUTER GENERATED DOCUMENT AND NO SIGNATURE IS REQUIRED. YOU ARE REQUIRED TO ACKNOWLEDGE THIS PURCHASE ORDER BY SIGNING AND RETURNING THE COPY TO US WITHIN 2 WORKING DAYS AND IN SO DOING, YOU CONFIRM THAT YOU ARE IN AGREEMENT WITH ALL THE TERMS AND CONDITIONS THEREIN.

The issue here is the construction of the caption, in particular the words '... all the terms and conditions therein'. *Concise Oxford English Dictionary* (12th Ed) define the word 'therein' as 'in that place, document or respect'. Reading the caption in totality, it is my view that '... all the terms and conditions therein' refers to the terms and conditions as contained in the respective purchase order which was mentioned earlier and which the defendant is required to acknowledge by signing and returning the same within two working days. There is no other document mentioned or referred to in the caption. As such I take the view the above caption could not be construed as to lead to the conclusion that reference is made to the FPSO terms and conditions.

(b) the second caption reads:

> Note: Acceptance of this order constitute an acceptance of the general terms and conditions attached thereof

The *Concise Oxford English Dictionary* (12th Ed) define the word 'thereof' to mean 'of the thing just mentioned'. It is clear that 'this order' in the caption refers to the purchase order, thus 'the general terms and conditions attached thereof' would necessarily mean the

general terms and conditions which is found in the purchase order being the thing that was mentioned earlier. There are no other thing mentioned in the caption except the order which is the purchase order. The caption does not make any mention or reference to the FPSO terms and conditions. Neither was there any document attached to the purchase orders. As such it is my considered view that the caption cannot be construed as referring to the FPSO terms and conditions as there is nothing to support such construction.

[42] Unlike what transpired in *Press Metal Sarawak* and *Albilt Resources Sdn Bhd*, there are no evidence before this court of any form of communications being exchanged between the parties to indicate the agreement of the parties to submit to arbitration in the event disputes arises between them.

[43] An arbitration agreement is intended to record the parties' consensus to arbitrate disputes outside court room. Consent of parties is therefore indispensable as it form the basis of parties resorting to alternate dispute resolution. In so far as the wordings and forms of an arbitration agreement or arbitration clause is concerned there is no hard and fast rule to be observed. In this respect what was said by Abdul Malek Ishak JCA in *Albilt Resources Sdn Bhd* is of relevance:

> [55] No specific words or forms are required to be used or filled in order to constitute an arbitration clause or an arbitration agreement. Even an electronic transmission referring to or implying the parties' intention to submit to arbitration would be sufficient to attract arbitration. What is of importance is this. That there must be an agreement to refer disputes to arbitration. That is essential. And the intention to arbitrate must be clear and unequivocal. Thus, when there is a clear intention to arbitrate, effect must be given to it notwithstanding that the arbitration clause is incomplete or it lacks certain particulars (*Lim Su Sang v Teck Guan Construction & Development Co Ltd* [1966] 2 MLJ 29; [1965] 1 LNS 97 (FC) and *Woh Hup (Pte) Ltd v Property Development Ltd* [1991] 3 MLJ 82; [1991] 2 CLJ 1260 ; [1991] 4 CLJ Rep 1174).

[44] One of the argument put forward by the defendant in the instant case is that the FPSO terms and conditions are not binding because neither party signed the FPSO terms and conditions. In so far as the incorporation by reference issue is concerned, I agree with the plaintiff's contention that there is no legal requirement for parties to sign on the document referred to in the arbitration agreement (*Ajwa for Food Industries Co (MIGOP), Egypt*).

[45] As stated earlier the caption appears on the last page of the purchase orders. Based on exh 'P2' of the plaintiff's affidavit encl 3, there are no more pages running after that last page. I concede that it is not a requirement under the law for the document which is referred to in the arbitration agreement to be

attached to the arbitration agreement. However I take the view that that position of the law is confined to cases where the document referred to in the arbitration agreement is specifically identified either directly or indirectly. However in a situation where reference to a document is made in general, broad and unspecific terms it would be prudent to attach to the arbitration agreement the document intended to be referred to. This is to avoid ambiguity as it is essential for parties to agree unequivocally for disputes arising between them to be referred to arbitration.

[46] In *Press Metal Sarawak* the arbitration agreement that is the placement slip made reference to the previous insurance policy which was identified by the insurance policy number. In *Albilt Resources Sdn Bhd* the document referred to was identified, namely, a contract executed between Al Resources Sdn Bhd and its employer Redez Properties Sdn Bhd which was based on the PAM contract which contain an arbitration clause.

[47] In contrast the caption in the instant case does not refer to the FPSO terms and conditions either explicitly or otherwise. There is just nothing in the captions printed on the purchase orders to connect it to the document FPSO terms and conditions so as to effectively make the arbitration agreement clause as part of the purchase orders.

[48] Submission to arbitration is voluntary and intentional. It is a conscious decision made by parties not to go to court for determination in respect of their disputes. As such there must be evidence to show such intention or evidence from which inference may be made or conclusion may be drawn that the parties had intended to submit to arbitration. In this instant case, I find no such evidence. I am therefore constrained to rule that there is no valid and binding arbitration agreement between the plaintiff and defendant for disputes arising between them to be referred to arbitration. In this respect the issue of the arbitration agreement being inoperative (as argued by the defendant) under s 10 of the AA 2005 does not arise as there is no valid and binding arbitration agreement between the parties in the first place.

[49] Since the declaratory relief sought by the plaintiff in the OS hinges on the existence of a valid and binding arbitration agreement I am constrained to dismiss prayers 1 and 2 of the OS on the basis there is no arbitration agreement between the plaintiff and the defendant.

[50] The next issue for determination is whether an order to restrain the defendant from presenting a winding up petition to wind up the plaintiff without referring the matters to arbitration ought to be granted.

[51] It is to be noted that the plaintiff's reason for seeking to injunct the defendant from presenting a winding up petition is to enable the dispute that arose between the parties be referred to arbitration for determination. Hence the injunction is sought on the basis there is a valid binding arbitration agreement between the plaintiff and the defendant. In view of my finding that there is no valid and binding arbitration agreement it follows that the plaintiff's application for an interim injunction fail as there is no basis to compel the defendant to refer the dispute to arbitration. Injunction being an ancillary or incidental relief cannot stand on its own as it is dependent upon there being a pre-existing cause of action arising out of a legal or equitable right and granted to reserve the status quo pending the ascertainment of the disputes (*IMPSA (M) Sdn Bhd v Bank Muamalat Malaysia Berhad & Ors* [2011] MLJU 1535; [2011] 1 LNS 729. Since the plaintiff's attempt to enforce its right to have the dispute referred to arbitration fails for the simple reason there is no valid and binding arbitration agreement, the issue of restraining the defendant from pursuing a winding up proceeding against the plaintiff does not arise. There is no issue of preserving the status quo too. In the event a winding up petition is presented against the plaintiff, it is entitle to oppose it, possibly on the ground that there is bona fide dispute to the monetary claims made by the defendant as stated in the statutory notices.

[52] However for purpose of completeness I will assume there is a valid binding arbitration agreement and that parties ought to refer the dispute to arbitration. In this respect the issue is whether the defendant ought to be restrained from presenting a winding up petition pending the determination of the dispute via arbitration.

[53] In *Keet Gerald Francis Noel John v Mohd Noor bin Abdullah & Ors* [1995] 1 MLJ 193 the Court of Appeal set out the elements to be considered when dealing with an application for interlocutory injunction:

(a) whether based on the totality of the facts presented whether it discloses a bona fide serious issue to be tried. However at this stage the court is not required to make any determination on the merits of the claim or any defence to it. If there are no bona fide serious issues disclosed, that is the end of the matter and the relief should be refused;

(b) if there are bona fide serious issue to be tried disclosed that requires further investigation, the court must consider where the justice of the case lies. In making the assessment, the court must take into account all relevant matters, including the practical realities of the case and weigh the harm the injunction would cause if granted or refused; and

(c) the court must bear in mind that the remedy the court asked to administer is discretionary, intended to produce a just result for the

A period between the date of the application and the trial proper and intended to maintain the status quo.

SERIOUS ISSUES TO BE TRIED

B **[54]** At this juncture it is appropriate to refer to the case of *Lian Keow Sdn Bhd & Anor v Overseas Credit Finance (M) Bhd & Ors* [1982] 2 MLJ 162 where the Federal Court through Salleh Abbas FJ (as he then was) set out the principles governing the granting of interlocutory injunction:

C > An interlocutory injunction is a temporary and discretionary remedy. To consider whether to grant it or to refuse it the court is not concerned with the chances of success or failure of the appellants in proving their civil suit at the forthcoming trial, neither is the court's function to evaluate the evidence and materials before it for that purpose. The court is simply concerned with what it has to do in the meantime in order to protect the right of the parties so that no irreparable injury would be caused to either of them. Further whilst the Court is not concerned with such questions the court must however, be satisfied that there are serious questions to be gone into in that suit, lest an application for an injunction should be made on frivolous and vexatious grounds (*American Cyanamid Co v Ethicon Ltd* [1975] AC 396).

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E **[55]** I am therefore mindful that at this stage the court is not required to evaluate the evidence to make any decision on any question of fact. What is of concern to the court at this stage is to determine, on the affidavits available, whether there is serious question to be tried.

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[56] In essence the plaintiff's case is that at all material times it disputes the claim made by the defendant. The alleged bona fide serious issues are briefly stated at para 15 above. According to the plaintiff under cl 3.7 of the FPSO
G terms and conditions it is entitled to withhold payment on any claim until the dispute is mutually agreed between the parties. In the event no mutual agreement reached between the parties, the dispute is to be referred to arbitration pursuant to cl (m) of the FPSO terms and conditions. The plaintiff also disputes the 8% interest charged by the defendant upon delay making
H payment.

[57] The defendant has tabulated the invoices:

(i) first batch:

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NO	LETTER	P/O	D/O	INVOICE
1	Defendant's letter dated 12 November 2015	P/O No H100000300-1 dated 03 September Term P/O: DAP	D/O No DUG-THHE-15-002-DO dated 10 November 2015, accepted by Plaintiff's Warehouse on 05 February 2016	Invoice No: IV/THHEB/15/003 dated 12 November 2015 total USD224,322-10 Payment Term: 30 days, interest 8% per month for any delay
2	Defendant's letter dated 23 November 2015	P/O No H100000301-1 dated 03 September Term P/O: DAP	D/O No DUG-THHE-15-003 & 004-DO dated 12 November 2015, accepted by Plaintiff's Warehouse on 03 February 2016	Invoice No: IV/DUG15/THHEB/004 dated 23 November 2015 total USD346,920-21 Payment Term: 30 days, interest 8% per month for any delay
3	Defendant's letter dated 17 December 2015	P/O No H100000318-1 dated 22 October 2015 Term P/O: DAP	D/O No DUG-THHE-15-005-DO dated 16 December 2015, accepted by Plaintiff's Warehouse on 01 February 2016	Invoice No: IV/DUG15/THHEB/005 dated 17 December 2015 total USD59,034-09 Payment Term: 30 days, interest 8% per month for any delay
4	Defendant's letter dated 17 December 2015	P/O No H100000322-1 dated 27 October 2015 Term P/O: DAP	D/O No DUG-THHE-15-006-DO dated 16 December 2015, accepted by Plaintiff's Warehouse on 01 February 2016	Invoice No: IV/DUG15/THHEB/006 dated 17 December 2015 total USD130,909-44 Payment Term: 30 days, interest 8% per month for any delay

A B C D E F G H I

NO	LETTER	P/O	D/O	INVOICE
5	Defendant's letter dated 23 December 2015	P/O No H100000319-1 dated 22 October 2015	D/O No DUG-THHE-15-007(1)-DO dated 16 December 2015, accepted by Plaintiff's Warehouse on 01 February 2016 D/O No DUG-THHE-15-007(2)-DO dated 21 December 2015, accepted by Plaintiff's Warehouse on 03 February 2016	Invoice No: IV/DUG15/THHEB/007 dated 17 December 2015 total USD63,172-79 Payment Term: 30 days, interest 8% per month for any delay
6	Defendant's letter dated 31 December 2015	P/O No H100000327-1 dated 27 October 2015 Term P/O: DAP	D/O No DUG-THHE-15-008(1&2)-DO dated 16 December 2015, accepted by Plaintiff's Warehouse on 01 February 2016	Invoice No: IV/DUG15/THHEB/008 dated 31 December 2015 total USD77,073-46 Payment Term: 30 days, interest 8% per month for any delay

(ii) second batch:

NO	LETTER	P/O	D/O	INVOICE
1	Defendant's letter dated 29 February 2016	P/O No H100000356-1 dated 14 January 2016 Term P/O: DAP	D/O No DUG-THHE-16-004-DO	Invoice No: IV/DUG16/THHEB/004 dated 29 February 2016 total USD84,386-18 Payment Term: 30 days, interest 8% per month for any delay

NO	LETTER	P/O	D/O	INVOICE
2	Defendant's letter dated 29 February 2016	P/O No H100000355-1 dated 14 January 2016 Term P/O: DAP	D/O No DUG-THHE-16-001(1&2)-DO	Invoice No: IV/DUG16/THHEB/002 dated 29 February 2016 total USD179,479-51 Payment Term: 30 days, interest 8% per month for any delay
3	Defendant's letter dated 29 February 2016	P/O No H100000354-1 dated 13 January 2016 Term P/O: DAP	D/O No DUG-THHE-16-003-DO	Invoice No: IV/DUG16/THHEB/003 dated 29 February 2016 total USD158,469-89 Payment Term: 30 days, interest 8% per month for any delay

[58] Based on the invoices exhibited by the defendant in its affidavit encl 5 (exh 'DH1'), the following terms appears:

(a) payment of terms: nett 30 days;

(b) payment should be crossed and payment to be made to the defendant;

(c) interest rate 8% per month will be charged on overdue accounts; and

(d) any discrepancies should be lodged within seven days of the invoice.

No evidence put forward by the plaintiff to show they did not receive the invoices. Above all no evidence to show the plaintiff disputed, challenged or raised any issue in respect of any the matters stated in the invoices.

[59] In what appears as a desperate attempt to raise serious issue to justify for an injunction the plaintiff contends that it is entitle, under cl 3.7 of the FPSO terms and conditions, to withhold payment until the dispute is settled by mutual agreement. To my mind this is a fallacious contention for the reasons stated hereafter. Firstly, it appears that the plaintiff is incorporating a whole new set of terms and conditions, namely, the FPSO terms and conditions into the underlying contractual relationship between the plaintiff and the defendant which is governed by the terms in the documents exhibited by the defendants in exh 'DH1', namely, the purchase orders, delivery orders and invoices. Since the parties are bound by the terms of the said documents the plaintiff cannot unilaterally incorporate other extrinsic terms and conditions outside the scope of what was mutually agreed earlier between the parties. This attempt by the plaintiff amounts to rewriting the terms of the agreement

between the parties. This erroneous act of the plaintiff is simply against the very basic principles of law of contract. Thus there can never be any issue arising out of provisions which was never mutually agreed by the parties. As stated in para 28 above s 9 of the AA 2005 allows parties to an agreement (in writing) to incorporate an arbitration agreement clause contained in a separate document to be part of the parties agreement. The said s 9 is not about incorporating that separate document to be part of the parties agreement. With respect, learned counsel for the plaintiff has misconstrued the said statutory provision.

[60] Secondly, assuming for a moment cl 3.7 of the FPSO terms and conditions is part of the agreement between the parties I am of the view the plaintiff cannot avail itself to the said provision. Clause 3.7 is part of article 3 which deals with invoicing and payment. To appreciate the significance of cl 3.7 it must be read in the context of the whole of article 3 which is reproduced below:

ARTICLE 3 INVOICING AND PAYMENT

3.1 As the WORK progress, SUPPLIER/CONTRACTOR shall make claim for milestone related payments by giving written notice to COMPANY of the progress of WORK achieved evidencing achievement of the Milestone(s) set out in Exhibit C — Compensation.

3.2 The cost of the WORK done under VARIATION ORDERs shall be invoiced either by progressive invoicing of the portion of the WORK completed in accordance with the progress achieved for that VARIATION ORDER or when all the WORK in that VARIATION ORDER is completed. PARTIES will agree and indicate in each VARIATION ORDER the method by which the cost of the VARIATION ORDER shall be invoiced.

3.3 All invoices shall be verified and signed by the authorised signatory designated in Article 18 entitled SUPPLIER/CONTRACTOR Representative prior to submission to COMPANY for payment. Invoicing for WORK performed shall be kept current at all times. All invoices submitted shall comply with the requirement of Exhibit D — Administration Instructions, item 11, Invoicing and Payment Procedure.

3.4 Any charges made by SUPPLIER/CONTRACTOR for items reimbursable under the CONTRACT or payments made on COMPANY behalf shall be net of all discounts and allowances and be supported by sufficient documentation such as delivery notes, time sheets to fully support such reimbursement and permit verification thereof by SUPPLIER/CONTRACTOR. Invoices to be attached whenever required. Man-hours day works invoiced to COMPANY must be supported by copies of the COMPANY APPROVED time sheets or APPROVED man-hour reports.

3.5 Invoices shall stipulate the CONTRACT number and title and shall be submitted in one (1) original and one (1) copy each complete with the necessary documentation as stated in Exhibit C. All invoices must be verified by COMPANY authorised representative as per Article 15 at WORKSITE and shall be addressed to:

THHE Bhd
Level 23, Tower B,
Menara UOA Bangsar,
No 5, Jalan Bangsar Utama 1,
59000 Kuala Lumpur,
Malaysia
ATTENTION: CHIEF FINANCE OFFICER (FPSO LAYANG PROJECT)

3.6 Payments of undisputed invoiced items shall be made on or before the thirtieth (30th) day after receipt thereof. If the thirtieth (30) day falls on a Saturday or Sunday or a gazetted Kuala Lumpur public holiday, the next working day shall be deemed to be the due date for payment.

3.7 Payments in respect of disputed items may be withheld by COMPANY until the settlement of the dispute by mutual agreement. In the event that COMPANY disputes any item on a particular invoice COMPANY shall be entitled to withhold from making payment only the actual amount in dispute and COMPANY shall inform SUPPLIER/CONTRACTOR of the disputed item within fourteen (14) days of the receipt by COMPANY of that particular invoice. To avoid delay SUPPLIER/CONTRACTOR shall include MILESTONE CERTIFICATE or PROGRESS CERTIFICATE APPROVED by COMPANY authorised personnel.

3.8 All payments to SUPPLIER/CONTRACTOR by COMPANY under the terms of this CONTRACT shall be in Ringgit Malaysia.

3.9 Upon notification of any erroneous billings made by or payments made to SUPPLIER/CONTRACTOR by SUPPLIER/CONTRACTOR, SUPPLIER/CONTRACTOR shall within fourteen (14) days make appropriate adjustments therein and reimburse to COMPANY any amount of overpayment still outstanding as reflected by said adjustments, notwithstanding the fact that a temporary withholding or a correction of discrepancy may have been effected previously. Notwithstanding the foregoing, COMPANY shall be entitled to deduct such amount from payment due to SUPPLIER/CONTRACTOR. Accordingly, COMPANY shall pay SUPPLIER/CONTRACTOR any amount of underpayment subject to verification thereof.

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3.10 If the payments have not been received for the undisputed invoices by the SUPPLIER/CONTRACTOR within 45 days (allowing grace period of 15 days) after the invoice date, an interest of KLIBOR plus 1% per annum will be due over the full amount of the invoice for every month or part of month that the invoice payment is delayed thereafter.

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[61] Based on cl 3.7 above, the plaintiff is allowed to withhold payments in respect of disputed items until the dispute is settled by mutual agreement. In the event the plaintiff disputes the invoice, only the actual amount in dispute shall be withhold and the plaintiff is required to inform the defendant being the supplier of the disputed item within 14 days from receipt of the invoice.

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[62] It is crystal clear that the plaintiff may withhold payment only in respect of items on the invoice which is disputed and that the plaintiff must inform the defendant of the disputed items. Thus the pre-requisite to withhold payment is a dispute in respect of those item(s) stated in the invoices. In other words there must first be a dispute between the parties in respect of the item concerned before the plaintiff can withhold payment. However there is no shred of evidence to show that there is a dispute between the plaintiff in relation the items/goods in the invoice and that the plaintiff has notified the defendant the same. The plaintiff also fail to show that it has notified the defendant of its objection on the 8% interest imposed as stated in the invoices.

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[63] It is worth mentioning that the invoices were issued by the defendant over a period of about three months from 12 November 2015–29 February 2016. All together there were nine invoices issued — six invoices in respect of the goods supplied in the first batch and three invoices in respect of the goods supplied in the second batch. It must be emphasised again that the plaintiff in its affidavits did not dispute receiving the delivery orders, invoices and above all the goods. However for obvious reasons, the plaintiff only exhibited the purchase orders (exh 'P1' encl 3) it issued but not the delivery orders and invoices that was sent and received by the plaintiff.

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[64] In short, no contemporaneous evidence adduced to substantiate the plaintiff's claim that there is dispute in relation to the goods it purchased, received and the invoices issued thereto. Therefore it is not open to the plaintiff now to raise issues which were never raised at the point in time when those issues should have been raised. If the issues the plaintiff raised now had been raised back then, the issues might have been resolved amicably resulting in no dispute at all. Since there were no dispute raised, there can be no serious issues let alone bona fide serious issues. In any event the FPSO terms and conditions are not the terms and conditions that the parties had mutually agreed. As such

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there is no legal basis for the plaintiff to use cl 3.7 of the FPSO terms and conditions to dispute the defendant's claim.

[65] One pertinent fact must be mentioned here. Even after the receipt of the two letters of demand dated 18 July 2016 (exhs 'P3' and 'P4' in the plaintiff's affidavit encl 3) and the two statutory notices dated 7 September 2016 issued under s 218 of the CA 1965 (exhs 'P5' and 'P6' in the plaintiff's affidavit encl 3) there is no evidence that the plaintiff has responded to the said demand disputing the claims of USD901,432.09 and USD422,335.58 made by the defendant under the respective invoices issued by the defendant in the first and second batch. Again, when the statutory notices were issued demanding for the said sum stated in the letters of demand to be paid in Ringgit Malaysia the plaintiff did not provide evidence that it disputed the demand for such payment.

[66] The conduct of the plaintiff remain consistent at all material times. Based on the affidavit evidence the plaintiff did not, at any point in time, object or dispute or even make queries in relation to or in connection with the goods sold and delivered to it by the defendant. Above all the evidence strongly suggests the plaintiff accepted the invoices issued by the defendant without any issue or dispute raised. As such it is too late now for the plaintiff to raise issues in relation to the same. And to import a provision which is outside the scope of the parties mutual agreement at this late stage is blatantly an act of mala fide on the part of the plaintiff.

[67] Despite keeping silent through and through the plaintiff, in its affidavit encl 6, questions the accuracy and truthfulness of the documents exhibited by the defendants namely the purchase orders, delivery orders and invoices. The plaintiff says the documents are dubious and appear to be unreliable. According to the plaintiff the relevant authorities and agencies have already undertaken steps to investigate certain procurement of business or projects. In fact the plaintiff had also conducted internal inquiry and investigations on certain procurement of business or projects that are tainted with corruption.

[68] It is therefore unsurprising that the strong allegations about the accuracy and truthfulness of the documents exhibited by the defendant (including the plaintiff's own purchase orders which plaintiff has not denied issuing such orders) is not supported by any evidence whatsoever. With regards to the purported investigation carried out by the relevant authorities I do not see how such investigations affect the purchase orders, delivery order and invoices issued thereto as the plaintiff did not bother to offer any evidence to that effect. In any event based on the plaintiff's own words 'investigate certain procurement of business or projects' it is highly speculative to even think the

purchase orders and the transactions in relation thereto falls within that 'certain procurement of business or projects' which is investigated. Likewise, there is no evidence to indicate the internal inquiry and investigations which is said to be conducted by the plaintiff on 'certain procurement of business or projects that are tainted with corruption' relate to the transactions between the plaintiff and the defendant.

[69] Granted at this stage that the court is not required to decide on any question of fact. Nevertheless the court must be satisfied, on the evidence available, there are serious issues to be tried. On the affidavit evidence it is obvious the allegations of inaccuracy, unreliable, investigation by relevant authority and internal inquiry by the plaintiff are nothing but mere assertion and baseless. Considering the conduct of the plaintiff from the transactions which took place during the implementation of the contract and in this proceeding, I cannot help but conclude such conduct is manifest of the plaintiff's desperate tactic to delay the defendant from pursuing its claim against the plaintiff. In this respect I am incline to agree with the defendant that the purported serious issue raised is sheer afterthought.

[70] Since the plaintiff fails to overcome the first hurdle of proving the existence of serious issue to be tried the plaintiff fails at the outset to secure an interim injunction.

CONCLUSIONS

[71] In view of my finding that there is no valid and binding arbitration agreement between the parties, the defendant is entitled to pursue its claim against the plaintiff without reference to arbitration. Thus the statutory notices issued under s 218 of the CA 1965 is proper and regular. I accordingly dismissed the declaratory reliefs sought in prayers 1 and 2 of the OS.

[72] It is my considered view that the absence of a valid and binding arbitration agreement nullify the plaintiff's prayer for an injunction to restrain the defendant from pursuing further action pursuant to the issuance of the statutory notice under s 218 of the CA 1965. Even assuming there is a valid and binding arbitration agreement, the evidence available as discussed above does not justify this court to exercise its discretionary power to grant an injunction. As such prayers 3, 4 and 5 of the OS for injunctive relief was accordingly dismissed.

Prayers 1, 2, 3, 4 and 5 of originating summons dismissed.

Reported by Fatin Mohd Ismail